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No. 07-1458

FILED
JUL 23 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In the

Supreme Court of the United States

JOSEPH DEAN, *ET AL.*,

Appellants,

v.

LARRY LEAKE, *ET AL.*,

Appellees,

and

NORTH CAROLINA STATE CONFERENCE OF BRANCHES OF THE NAACP,

Appellee-Intervenor.

On Appeal from the United States District Court for the Eastern District of North Carolina

MOTION TO DISMISS OR, IN THE ALTERNATIVE, TO AFFIRM

ROY COOPER
Attorney General
State of North Carolina
Christopher G. Browning, Jr.
Alexander McC. Peters*
Tiare B. Smiley
North Carolina Department of Justice
Post Office Box 629
Raleigh, N.C. 27602
(919) 716-6900

July 2008

* Counsel of Record

COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Whether this Court lacks jurisdiction over the present appeal because appellants' notice of appeal was untimely filed.

2. Whether this appeal will be moot before it can be decided.

3. Whether this appeal is an improper attempt to have the merits of the case decided rather than to have a denial of a preliminary injunction reviewed.

4. Whether the court below abused its discretion by determining that appellants were not likely to prevail on the merits of their claim.

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On Appeal from the United States District Court for the Eastern District of North Carolina

MOTION TO DISMISS OR, IN THE ALTERNATIVE, TO AFFIRM

Pursuant to Rule 18.6 of the Rules of the Supreme Court of the United States, Appellees Larry Leake, *et al.*, move that this Court dismiss this appeal on the grounds that it is untimely, that it will be moot by the time it is heard and decided, and that the questions raised by the appeal are so insubstantial as to require no further argument. In the alternative, appellees move that this Court summarily affirm the Order of the three-judge United States District Court for the Eastern District of North Carolina, dated January 28, 2008.

OPINION BELOW

The Order of the three-judge United States District Court for the Eastern District of North Carolina, dated January 28, 2008, denying appellants' motion for preliminary injunction, which was not included in appellants' Jurisdictional Statement, is reprinted at pages App. 1 to App. 4 of this Motion to Dismiss or, in the Alternative, to Affirm ("M.D. App.").

JURISDICTION

The three-judge panel of the United States District Court for the Eastern District of North Carolina denied appellants' Motion for Preliminary Injunction on January 28, 2008. (M.D. App. 1- 4) Pursuant to 28 U.S.C. § 2101(b), appellants filed an untimely Notice of Appeal on March 20, 2008. Appellants invoke the jurisdiction of this Court pursuant to 28 U.S.C. § 1253.

STATEMENT

A. Factual Background

Plaintiffs challenge the current districting plans for the North Carolina Senate and the North Carolina House of Representatives, adopted on November 25,

2003.[1] *See* 2003 N.C. Sess. Laws (Extra Session) 434, §§ 1-4, 12. The 2003 plans were used for the 2004 and 2006 general elections. After denial of appellants' motion for preliminary injunctive relief, the 2008 primary was held using the 2003 plans. Like the two earlier plans, the 2003 districting plans were constructed using the official census numbers (P.L. 94-171 data) provided by the United States Census Bureau to North Carolina for redistricting purposes.[2]

Following the completion of the 2000 Census, the Census Bureau began its post-census Count Question Resolution Program ("CQR"), whereby state and local

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[1] The 2003 redistricting plan was the third statewide redistricting plan adopted by the General Assembly following the 2000 decennial census. The first two redistricting plans were struck by the North Carolina Supreme Court on the ground that they violated provisions of the North Carolina Constitution that prohibit dividing counties to form state House and Senate districts (the "whole county" provisions). *Stephenson v. Bartlett* (*Stephenson I*), 562 S.E.2d 377 (N.C. 2002); *Stephenson v. Bartlett* (*Stephenson II*), 582 S.E.2d 247 (N.C. 2003).

[2] Pursuant to 13 U.S.C. § 141(c), the Secretary of Commerce is required to complete, report and transmit the decennial census to the States within one year after the decennial census date, or in this case, one year after April 1, 2000. The P.L. 94-171 data is the decennial census provided to North Carolina in 2001.

governments could question and seek resolution of perceived errors in the Census. Specifically, the CQR provided a mechanism to challenge counts of housing units and group quarters (*e.g.*, college dormitories, nursing homes or military barracks) populations. According to the Census Bureau,

> [t]he CQR Program is a planned administrative review program that will handle external challenges to particular official Census 2000 counts of housing units and group quarters population received from state, local or tribal officials of governmental entities or their designated representatives in the U.S. and Puerto Rico. The CQR program is not intended to create a mechanism or process to challenge the March 6, 2001, decision of the Secretary of Commerce to release unadjusted Census 2000 redistricting data. No changes will be made to the apportionment or redistricting counts as a result of this program.

United States Census Bureau, *Count Question Resolution (CQR) Fact Sheet* (May 2001), http://-www.census.gov/dmd/www/cqrfsheet.htm. This data, however, only revised housing unit and group quarters population counts; it did not provide any other level of detail, including voting age population or race and ethnicity. The CQR program data were not meant to

be used for redistricting, nor was the data set complete enough to be used for that purpose. "The Census Bureau will not change the apportionment or redistricting counts to reflect corrections resulting from the CQR process. In accordance with the law, apportionment counts were delivered to the President on December 28, 2000, and the counts required for redistricting were delivered to the states by April 1, 2001." The Census 2000 Count Question Resolution Program, 66 Fed. Reg. 35,588 (2001).

The CQR resulted in a series of letters with corrections for 28 counties and 88 municipalities being sent to officials in North Carolina over a period of time beginning September 13, 2001 (Polkton, Anson County), and ending on January 8, 2004 (New Bern and Trent Woods, Craven County). The largest of these corrections was sent to Orange County officials on September 30, 2003, informing them of a downward correction of 2,696 persons based on errors in the geographic assignments of group quarters and of housing units. (J.S. App. 10-11) The Census Bureau released final corrected numbers based on its CQR on June 10, 2004; it was only at this stage that the CQR population data was provided to the states at the block level,[3] and the data did not include information as to

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[3] A census block is the smallest geographic entity for which the Census Bureau collects and tabulates all decennial census data, including race, ethnicity and

the racial make-up or the voting-age population of the census blocks in question. (J.S. App. 11)

Prior to the initiation of this action in November 2007, the only challenge to the current plans was an action challenging the formation of House District 18 in Pender and New Hanover counties on the grounds that the district was not necessary to comply with the provisions of § 2 of the Voting Rights Act and therefore unnecessarily crossed county lines in violation of the North Carolina Supreme Court's decisions in *Stephenson v. Bartlett* (*Stephenson I*), 562 S.E.2d 377 (N.C. 2002), and *Stephenson v. Bartlett* (*Stephenson II*), 582 S.E.2d 247 (N.C. 2003). *See Pender County v. Bartlett*, 649 S.E.2d 364 (2007), *cert. granted*, 128 S. Ct. 1648 (2008). The North Carolina Supreme Court held that a minority group is only protected by § 2 if that group constitutes a numerical majority of a proposed district. Consequently, the North Carolina Supreme Court proceeded to hold that the current configuration of District 18 was not required in order

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voting age; blocks average about 100 persons each. United States Census Bureau, *Strength in Numbers: Your Guide to Census 2000 Redistricting Data from the U.S. Census Bureau* 8-9 (July 2000), http://www.census.gov-/rdo/pdf/strenghth2.pdf. As appellants conceded below, "block level census data . . . is the level of data necessary to calculate accurately district deviations." (Docket No. 6, Pls. Mem. Supp. Prelim. Inj. at 15)

to comply with § 2. The court, in its August 24, 2007, opinion, directed that District 18 and "other impacted districts" must be redrawn, but it stayed that directive until after the 2008 general election to avoid disruption of the 2008 election cycle. *Pender County*, 649 S.E.2d at 376. On March 17, 2008, this Court granted the petition for writ of certiorari filed by the state defendants in that action. *See Bartlett v. Strickland*, 128 S. Ct. 1643 (2008).

B. Procedural Background

Appellants filed this action challenging the constitutionality of the current districting plan for the North Carolina General Assembly on November 21, 2007; the Complaint also sought the appointment of a three-judge panel pursuant to 28 U.S.C. § 2284. (Docket No. 1) On the same date, appellants filed a Motion for Preliminary Injunction. (Docket No. 4)

On December 7, 2007, the Honorable Karen J. Williams, Chief Judge of the United States Court of Appeals for the Fourth Circuit, convened a three-judge court for the United States District Court for the Eastern District of North Carolina and designated the following as the members of the three-judge panel: The Honorable Allyson K. Duncan, Judge of the United States Court of Appeals for the Fourth Circuit; the Honorable Louise W. Flanagan, Chief Judge of the United States District Court for the Eastern District of

North Carolina; and the Honorable Robert J. Conrad, Jr., Chief Judge of the United States District Court for the Western District of North Carolina. (Docket No. 28) On December 18, 2008, the North Carolina State Conference of Branches of the NAACP moved to intervene in this action as defendants. That motion was granted by the district court on January 4, 2008. (Docket No. 47)

On January 25, 2008, the three-judge court heard appellants' Motion for Preliminary Injunction. Appellants, in both their written and oral arguments in support of their motion, focused exclusively on their first claim for relief: that use of North Carolina's current districting plans should be enjoined for the 2008 election because those plans fail to comply with the requirements of one person, one vote in that they are based on the P.L. 94-171 data rather than on the CQR correction letters released up to the time the plans were enacted. Using the CQR data would make the overall range of deviation among districts exceed ten percent, whereas under the P.L. 94-171 data the overall range of deviation is less than ten percent.

On January 28, 2008, the three-judge court filed an Order denying, *inter alia*, appellants' Motion for Preliminary Injunction. (M.D. App. 1- 4) The three-judge court specifically noted that its findings and conclusions would be set forth in a separate memorandum opinion. (M.D. App. 3) On March 17,

2008, the three-judge court entered its Memorandum Opinion, authored by Judge Conrad, explaining why it had denied the Motion for Preliminary Injunction in its January 28 Order. (J.S. App. 1-26)

Appellants filed their Notice of Appeal on March 20, 2008. (J.S. App. 27-29) They did not apply to this Court for emergency relief so as to prevent the use of the current districting plans in the 2008 election.

This action remains pending in the district court. Upon the grant of certiorari by this Court in *Bartlett*, the three-judge panel issued an order holding all proceedings in this action in abeyance pending final resolution of *Bartlett* and disposition of this appeal.[4] (Docket No. 70)

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[4] This action and *Bartlett* involve the same House districting plan, and proceedings in this action have been held in abeyance by the three-judge court pending final resolution of *Bartlett* because one of appellants' causes of actions is predicated upon the viability of the decision of the North Carolina Supreme Court being reviewed in *Bartlett*. Appellants' representation, however, that this case is a "companion case" of *Bartlett* is simply not accurate. (J.S. 11)

ARGUMENT

This appeal of the denial of preliminary injunctive relief should be dismissed or the Order below affirmed for four independent reasons. First, this Court lacks jurisdiction over the appeal because appellants' notice of appeal was untimely filed. Second, this appeal will be moot by the time it can be decided. Third, this appeal is an improper attempt to have the merits of the case decided rather than to have a denial of a preliminary injunction reviewed. And fourth, the court below did not abuse its discretion by determining that appellants were not likely to prevail on the merits of their claim. Each of these provides ample reason to dismiss the appeal or affirm the decision below.

I. THE NOTICE OF APPEAL WAS NOT TIMELY

Appellants appeal only the three-judge court's denial of their motion for preliminary injunction. Contrary to the representation made by appellants (J.S. 2), no judgment has been entered in this matter or appears on the docket. The Order denying appellants' Motion for Preliminary Injunction was entered on January 28, 2008. In that Order, the court specifically noted: "The court will set forth it findings and conclusions in separate memorandum opinion." (M.D. App. 3)

Indeed, the three-judge court filed a separate Memorandum Opinion on March 17, 2008. That Memorandum Opinion begins as follows:

> This matter comes before the three-judge Court on Plaintiffs' Motion for a Preliminary Injunction. Due to the proximity of the candidates filing for the 2008 election, we issued an order without accompanying memorandum following the January 25 hearing, denying equitable relief. We now explain our reasoning.

(J.S. App. 1 (footnote omitted)) It was the January 28 Order, then, that effected the denial of the preliminary injunction sought by appellants; the March 17 Memorandum Opinion served only to explain *why* the preliminary injunction had been denied.

A party may appeal to this Court from an order of a three-judge court denying interlocutory injunctive relief. 28 U.S.C. § 1253. Such an appeal "shall be taken within thirty days from the judgment, order or decree, appealed from." 28 U.S.C. § 2101(b). Appellants filed their Notice of Appeal on March 20, 2008, more than thirty days after the entry of the January 28 Order denying preliminary injunctive relief. Appellants' appeal can only be timely, then, if the thirty days for appeal began to run not with the Order denying the motion for preliminary injunction,

but with the later opinion stating why injunctive relief had earlier been denied. In this case, the time for appeal began to run with the filing of the January 28 Order.

Those cases that have considered which of two judicial filings constitutes the final decision from which appeal can be made have uniformly looked to the intent of the trial court; that is, they have asked which order or opinion did the court intend to be the final judicial act in the matter. *See, e.g., Riley v. Kennedy*, 128 S. Ct. 1970, 1980-81 (2008); *Catlin v. United States*, 324 U.S. 229, 233 (1945). *Accord Blanchard v. Commonwealth Oil Co.*, 294 F.2d 834, 836-37 (5th Cir. 1961); *Carnes v. United States*, 279 F.2d 378 (10th Cir.), *cert. denied*, 364 U.S. 846 (1960). Specifically considering a situation where a district court filed and docketed its opinion granting a motion for summary judgment more than two months before a formal judgment was entered and docketed, this Court stated: "While an opinion may embody a final decision, the question whether it does so depends upon whether the judge has or has not clearly declared his intention in this respect in his opinion." *United States v. F. & M. Schaefer Brewing Co.*, 356 U.S. 227, 232 (1958). The Court went on to reject the argument that the time for appeal began to run with the entry of the judgment rather than the earlier opinion, stating: "'Where, as here, a formal judgment is signed by the judge, this is *prima facie* the decision or judgment

rather than a statement in an opinion or a docket entry. . . . The judge was conscious, as we are, that he was without power to extend the time for appeal.'" *Id.* at 235 (quoting *United States v. Hark*, 320 U.S. 531, 534-535 (1944)).

In this case, appellants sought a preliminary injunction enjoining the use of North Carolina's current legislative districting plans for the 2008 election and requiring the creation of new plans for that election. The three-judge court entered its order denying that injunctive relief on Monday, January 28, 2008, just days after its hearing on the motion. The three-judge court was aware that, pursuant to N.C. GEN. STAT. §§ 163-1(b) and -106(c), persons seeking their party's nomination for seats in the North Carolina General Assembly were required to file their notices of candidacy between February 11 and February 29, 2008, in preparation for the May 6 primary. It was vital, therefore, that the three-judge court resolve any uncertainty and settle the question of whether the current districting plan could be used for the 2008 election as quickly as possible; as reflected in their later Memorandum Opinion, the three-judge court acted expeditiously because of "the proximity of the candidates filing for the 2008 election." (J.S. App. 1)

The three-judge panel undoubtedly also understood that any appeal from their order denying

preliminary injunctive relief would have to be undertaken as quickly as possible since the election process was poised to begin. Thus, the three-judge court intended for the January 28 Order to be their final judicial act with regard to the motion for preliminary injunction; the March 17 Memorandum Opinion, by its express terms, served only to explain why the motion had been denied on January 28.

Because appellants failed to file their notice of appeal within thirty days of entry of the three-judge court's January 28 Order denying their request for preliminary injunctive relief, their appeal is not timely and must be dismissed.

II. THIS APPEAL WILL BE MOOT BEFORE IT CAN BE DECIDED

Appellants have appealed from the three-judge court's denial of their Motion for Preliminary Injunction, which sought to prohibit the State of North Carolina from using its current legislative districting plans for the 2008 election. Appellants did not seek any injunctive relief from this Court pending their appeal. Accordingly, primaries were conducted on May 6, and the 2008 election for the 170 members of the North Carolina General Assembly is proceeding using the plans that appellants sought to enjoin. By the time this appeal can be heard and decided, the 2008 general election will, in the usual course of

events, be over and the relief sought to be achieved by the preliminary injunction will be unattainable. Appellants' appeal, therefore, is certain to become moot while pending before this Court.

The harm claimed by appellants here – the conduct of the 2008 election for members of the North Carolina General Assembly under plans they claim are unconstitutional – cannot be redressed by a favorable ruling by this Court because the 2008 election process will have been completed. Because any decision of this Court will not provide relief for the harm they allege, this appeal is moot. *Cf. Davis v. FEC*, 128 S. Ct. 2759, 2008 U.S. LEXIS 5267, *17 (2008) (considering issues of standing) ("To qualify for standing, a claimant must present an injury that is . . . likely to be redressed by a favorable ruling.").

Appellants claim that the decision of the three-judge court denying preliminary injunctive relief "effectively determined the outcome" of their claims on the merits. (J.S. 3) To the contrary, the court below has not determined the merits of their claims "effectively" or otherwise. All that the three-judge court has decided is that appellants failed to meet their burden for obtaining preliminary injunctive relief. Given the stages that still remain in this appeal – briefing, oral argument and decision – no decision by this Court will redress the harm alleged by appellants in this appeal because the 2008 election will already be

over.[5] *Cf. Univ. of Texas v. Camenisch*, 451 U.S. 390, 398 (1981) (where "the terms of the injunction . . . have been fully and irrevocably carried out" prior to the appeal being heard, any question as to whether the preliminary injunction should have been granted becomes moot). Accordingly, this appeal should be dismissed as moot.

III. THE QUESTIONS ARE NOT SUBSTANTIAL

A. Appellants Are Asking this Court to Decide the Merits of Their Claims Before the Trial Court Has Considered the Merits

Appellants have appealed the denial of their Motion for Preliminary Injunction. In arguing that motion, appellants focused exclusively on their claim that North Carolina's current legislative districting plans enacted in 2003 violate one person, one vote principles because the State did not rely on then-incomplete post-census adjustments to 2000 census data. (J.S. App. 3) Under the post-census adjustments the overall deviation among districts in both the Senate and House plans would exceed ten percent;

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[5] *Bartlett* will have been decided, and proceedings in this case will have resumed, in time for action to be taken, if necessary, prior to the 2010 election.

under the uncorrected P.L. 94-171 data, the overall deviation is less than 10 percent. (J.S. App. 4, 6, 15, 23 (nn. 6-7))

"A preliminary injunction is an extraordinary and drastic remedy; it is never awarded as of right." *Munaf v. Geren*, 128 S. Ct. 2207, 2219 (2008) (internal quotation marks and citations omitted). The three-judge court weighed the motion using the standard set forth by the United States Court of Appeals for the Fourth Circuit. (J.S. App. 13) Under that standard, the court considered and balanced "(1) the likelihood of irreparable harm to the plaintiff if the preliminary injunction is denied, (2) the likelihood of harm to the defendant if the requested relief is granted, (3) the likelihood that the plaintiff will succeed on the merits, and (4) the public interest." *Direx Israel, Ltd. v. Breakthrough Medical Corp.*, 952 F.2d 802, 812 (4th Cir. 1991). As the court below noted, while generally the harms to the parties are balanced before any consideration of likelihood of success on the merits, "when the harm alleged by the plaintiff is the deprivation of a constitutional right, the likelihood of success on the merits is so 'inseparably linked' to the proving of an actual harm that the court may proceed directly to consider the merits of the plaintiff's action." (J.S. App. 14, (citing *Giovani Carandola, Ltd. v. Bason*, 303 F.3d 507, 511 (4th Cir. 2002))) Applying this standard, the three-judge panel determined that appellants were not likely to succeed on the merits of

establishing a violation of the one person, one vote principle.

This Court has set forth the standard of review for considering an appeal from the granting or denial of preliminary injunctive relief. "[A]n application for an interlocutory injunction is addressed to the sound discretion of the trial court; and that an order either granting or denying such an injunction will not be disturbed by an appellate court unless the discretion was improvidently exercised." *Alabama v. United States*, 279 U.S. 229, 231 (1929). This principle applies equally to appeals from three-judge courts as to appeals from single judges. "The duty of this Court, therefore, upon an appeal from such an order, at least generally, is not to decide the merits but simply to determine whether the discretion of the court below has been abused." *Id.* Indeed, "[a]n order of a court of three judges denying an interlocutory injunction will not be disturbed on appeal unless plainly the result of an improvident exercise of judicial discretion." *United Fuel Gas Co. v. Public Service Comm'n*, 278 U.S. 322, 326 (1929).

It is notable that appellants nowhere in their Jurisdictional Statement reference this standard of review, nor do they make even the slightest attempt to demonstrate how the three-judge court below abused its discretion in denying preliminary injunctive relief.

Coupled with the lack of any sense of urgency displayed by appellants' failure to seek emergency injunctive relief from this Court pending appeal, the failure to argue in any way about how the court below abused its discretion shows that appellants' real concern is not the denial of a preliminary injunction that would have prevented the use of North Carolina's current districting plans in the 2008 election. Rather, appellants are attempting to use this appeal as a vehicle for having this Court bypass the evidentiary phase of the trial process to consider the merits of this action and establish the law of the case. This is also made evident in the conclusion to the Jurisdictional Statement, which essentially asks this Court to instruct the court below to use "the most accurate enumerated census data available to the state North Carolina [sic]" in deciding appellants' claims.

This Court has stated, of course, that "if a district court's ruling rests solely on a premise as to the applicable rule of law, and the facts are established or of no controlling relevance, that ruling may be reviewed even though the appeal is from the entry of a preliminary injunction." *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747, 757 (1986), *overruled on other grounds by Planned Parenthood v. Casey*, 505 U.S. 833 (1992). This exception to the general standard does not apply here, however, at least not in a way that would provide any relief to appellants. The three-judge panel considered

two specific arguments raised by appellants: whether the North Carolina General Assembly had a duty to use corrected census data and whether the North Carolina General Assembly acted without good faith in enacting the current districting plans. When the standards noted above are applied to the decision of the three-judge court, it is apparent not only that there was no abuse of discretion, but also that the court's application of the law was correct.

B. The General Assembly of North Carolina Was Not Required to Use Corrected Census Data in its 2003 Legislative Redistricting

Appellants argued below, as they do before this Court, that the North Carolina General Assembly was required to use corrected census data that had been partially issued by the United States Census Bureau when it enacted new legislative districting plans in November, 2003. The three-judge court rejected this argument, finding instead that under the relevant case law, "the General Assembly is permitted, but not required, to use the corrected census data." (J.S. App. 16) The opinion of the three-judge court interpreting and applying the case law (J.S. App. 16-18) is well-reasoned and demonstrates why the court believed that appellants were not likely to prevail on the merits of their one person, one vote claim.

In their arguments below, as in their Jurisdictional Statement, appellants focus almost exclusively on the corrected census data issued with respect to Orange County, North Carolina. While the correction for Orange County was the largest correction issued for North Carolina, it was not the only correction issued. As noted by the three-judge panel, many other corrections were released concerning other counties and municipalities,[6] and the CQR program was not completed and final data, including block level data, was not released until June 10, 2004 – more than six months after the enactment of the current legislative districting plan. (J.S. App. 11) The three-judge court also noted that the final data "do not indicate how the racial makeup of the blocks was affected by the corrections" and that the "corrected data carried a disclaimer that it was not to be used for redistricting purposes: 'Census counts used for Congressional apportionment and legislative redistricting . . . remain unchanged.'" (J.S. App. 11)

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[6] Lists of the 28 counties and 88 municipalities in North Carolina that received correction letters, including the dates of the letters and the count changes, can be found at http://www.osbm.state.nc.us-/demog/censcorc.html and at http://www.osbm.state.-nc.us/demog/censcorr.html. These were attached as Exhibits 5 and 6 to appellees' Memorandum in Opposition to Motion for Preliminary Injunction. (Docket No. 41)

The three-judge court concluded that "the General Assembly is permitted, but not required, to use the corrected census data." (J.S. App. 16) One observation made by the court below is particularly salient. The court cited to *Kirkpatrick v. Preisler*, where this Court held that:

> [s]ituations may arise where substantial population shifts [between censuses] can be anticipated. Where these shifts can be predicted with a high degree of accuracy, States that are redistricting *may* properly consider them. By this we mean to open no avenue for subterfuge. Findings as to population trends must be thoroughly documented and applied throughout the State in a systematic, not an *ad hoc*, manner.

Kirkpatrick v. Preisler, 394 U.S. 526, 535 (1969) (emphasis added); *see also* J.S. App. 17. Here, of course, the reliance on the corrected census data for Orange County urged by appellants would unquestionably have been *ad hoc*. There would have been no way, based on the incomplete CQR data that had been received when the General Assembly enacted the current districting plan, to apply the corrected data in a systematic manner throughout the State. Indeed, it would have been problematic even after the release of the final CQR data, since that data did not have other information necessary for redistricting, including

how the corrections affected racial makeup or voting age populations of the implicated census blocks.

The North Carolina General Assembly simply could not be required to rely on data not yet available and not thorough enough to provide the necessary information for redistricting. This is especially so, the three-judge court held, in light of "the fact that states conducting redistricting years after the decennial census are operating under a legal fiction. Those circumstances, as well as the inherently legislative nature of the redistricting function, support the granting of deference to the judgment of the General Assembly in deciding which data to use." (J.S. App. 18 (internal citations omitted)) *See also Karcher v. Daggett*, 462 U.S. 725, 732 (1983) ("Any standard, including absolute equality, involves a certain artificiality. As appellants point out, even the census data are not perfect, and the well-known restlessness of the American people means that population counts for particular localities are outdated long before they are completed.").[7] The three-judge panel did not abuse its discretion in determining that this Court's "cases

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[7] The dramatic population increases between 2000 and 2006 in some North Carolina counties and dramatic decreases in others, ranging from 41.61% growth (Union County) to 8.32% decline (Hyde County) were presented to the three-judge court through Exhibit 7 to appellees' Memorandum in Opposition to Motion for Preliminary Injunction. (Docket No. 41)

use permissive, not mandatory language when referring to the use of corrected census data." (J.S. App. 18) Likewise, it did not abuse its discretion by denying appellants' request for preliminary injunctive relief.

C. Appellants Failed to Offer Any Forecast of Evidence That the General Assembly of North Carolina Did Not Act in Good Faith When it Enacted the Current Legislative Districting Plans

Appellants argued below, again as they do to this Court, that the leadership of the North Carolina House of Representatives somehow acted to ensure that the General Assembly as a whole and the public were unaware of the corrected census data. (*See, e.g.*, J.S. 20-21, 28) These broad allegations carry no more weight now than they did before the three-judge panel, which called them "vague allegations of a conspiracy" for which appellants "offered little more than conclusory allegations of a conspiracy."[8] (J.S. App. 19-20)

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[8] These "vague allegations of a conspiracy" of silence are particularly unsubstantiated considering that the Census Bureau's correction letters were sent to numerous local governmental officials and that the Orange County errors were widely reported in the news media.

As the three-judge court concluded, appellants completely failed to offer any forecast of actual evidence, as opposed to "conclusory allegations," that any such conspiracy existed or that any legislative leaders acted in bad faith. In the absence of any forecast or evidence of bad faith, the three-judge court appropriately determined that appellants had not demonstrated that they were likely to succeed on the merits of a claim of bad faith. There simply can be no argument that the three-judge panel abused its discretion in making this determination, and the preliminary injunction was properly denied.

CONCLUSION

For these reasons, the motion to dismiss, or in the alternative, to affirm should be granted.

Respectfully submitted,

ROY COOPER
Attorney General
CHRISTOPHER G. BROWNING, JR.
ALEXANDER MCC. PETERS*
TIARE B. SMILEY

NORTH CAROLINA DEPARTMENT
OF JUSTICE
Post Office Box 629
Raleigh, N.C. 27602
(919) 716-6900

July 2008

*Counsel of Record

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
NORTHERN DIVISION

No. 2:07-CV-00051-FL-AD-RC

JOSEPH DEAN, *et al.*,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**ORDER**
	)	
LARRY LEAKE, in his official capacity as Chairman of the North Carolina State Board of Elections, *et al.*,	)	
	)	
Defendants.	)	
	)	

Before Allyson K. Duncan, United States Circuit Judge, Fourth Circuit; Robert J. Conrad, Jr., Chief United States District Judge for the Western District of North Carolina; and Louise W. Flanagan, Chief United States District Judge for the Eastern District of North Carolina, sitting by designation as a three-judge District Court

This matter, raising questions of federal and state law in the context of electoral apportionment in the North Carolina state elections process, came before the court January 25, 2008, for hearing on plaintiffs' motion for preliminary injunction and defendants' motion to hold in abeyance any consideration of the merits of the action, including any responsibility of defendants to answer or otherwise respond to the complaint until final disposition of a petition for *writ of certiorari* filed with the United States Supreme Court in Bartlett v. Strickland 76 U.S.L.W. 3289 (U.S. Nov. 21, 2007) (No. 07-689), seeking review of decision of the North Carolina Supreme Court in Pender County v. Bartlett, 361 N.C. 491, 649 S.E.2d 364 (2007).

The motion to hold in abeyance necessarily implicates the court's consideration of the motion for preliminary injunction. Accordingly, the court disposes of the latter filed motion first. Defendants acknowledge several of plaintiffs' claims do not rely on the decision in Pender County. The motion for injunctive relief focuses upon those allegations involving dilution of one person one vote and use of incorrect census data. Judicial economy and the public interest do not, as urged by defendants, favor withholding consideration of the issues raised on motion for preliminary injunction until resolution of Pender County. The court, in its discretion, DENIES

defendants' motion without prejudice to its right to refile should the Supreme Court grant the petition for certiorari. Defendants shall have twenty (20) days from date of entry of this order to answer or otherwise respond to the complaint.

Turning now to the motion for preliminary injunction, where "preliminary injunctions are extraordinary remedies involving the exercise of very far-reaching power to be granted only sparingly and in limited circumstances," Microstrategy Inc. v. Motorola, Inc., 245 F.3d 335, 339 (4th Cir. 2001) (quoting Direx Israel, Ltd. v. Breakthrough Med. Corp., 952 F.2d 802, 816 (4th Cir. 1992)), in its discretion, the court finds plaintiffs have not satisfied the weighty burdens upon them. The court will set forth its findings and conclusions in separate memorandum opinion. Accordingly, plaintiffs' motion for preliminary injunction is DENIED.

Where defendants shall have twenty (20) days from date of entry of this order to answer or otherwise respond to the complaint, pursuant to Federal Rule of Civil Procedure 26(f), the parties shall prepare a joint report and plan to be submitted to the court no later than March 10, 2008. Upon its receipt and review, the court shall enter a scheduling order in accordance with Federal Rule of Civil Procedure 16(b), the Local Civil Rules, EDNC, and the court's regular administrative

procedures. If either party desires conference with the court prior to entry of the scheduling order, request may be made in the joint report and plan.

SO ORDERED, this 28th day of January, 2008.

FOR THE COURT:

/s/ Louise W. Flanagan
LOUISE W. FLANAGAN
Chief United States District Judge